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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-23

No. A-1072

RAYMOND L. S. PATRIARCA,
PETITIONER,
v.
DONALD TAYLOR, et al.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

Table of Authorities Cited

Cases

Statutes

Rules

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Opinions Below

The Opinion of the United States Court of Appeals for the First Circuit, review of which is sought by the instant Petition, is reproduced in Appendix A to the Petition for Writ of Certiorari. Opinions of the United States District Court for the District of Rhode Island, and the Supreme Court of Rhode Island, pertinent to the instant Petition, are reproduced in Appendices B through E to the Petition for Writ of Certiorari.

Jurisdiction

The Jurisdiction of this Court is invoked by the Petitioner pursuant to 28 U.S.C. §1254(1). Respondents do not contest Petitioner's jurisdictional statement (Petition for Writ of Certiorari, p. 2); however. Respondents submit that Petitioner in his arguments in support of the granting of his Petition, goes beyond the record and the lower court decision sought to be reviewed. The point will be discussed below.

Statute Involved

The statutory provision cited by Petitioner is 28 U.S.C. §2253, which is reproduced in Appendix E to the Petition.

Travel of the Case

Petitioner's recitation of the procedural aspects of this matter, as set forth under the subheading "Statement of the Case" (Petition for Writ of Certiorari, pp. 3-4), are stipulated to as correct by Respondents.

Statement of Facts

Petitioner does not set forth a statement of facts, *per se,* in his Petition; however, in his arguments posited under the subheading "Reasons for Granting the Writ" (Petition for Writ of Certiorari, pp. 4-7) the Petitioner does make allegations of fact. Certain of those allegations, Respondents submit are erroneous and go beyond the record and opinions of the court below. In this regard, Respondents refer to this Court for consideration the facts as set forth in the Opinion which is sought to be reviewed *via* the instant Petition (Petition for Writ of Certiorari, Appendix A.), and the facts as described by the lower reviewing courts (Petition for Writ of Certiorari. Appendices B-E.).

Question Presented

Respondents concur in the question as set forth in the Petition under the subheading "Questions Presented" (Petition for Writ of Certiorari, p. 2).

Reasons for Not Reviewing the Cause

A. The Decision of the United States Court of Appeals for the First Circuit Should Not Be Reviewed Because It Does Not Conflict With Prior Rulings by Said Court of Appeals.

Review by this Court, *via* certiorari, of lower court rulings is available only under "special circumstances." *State of Ohio ex rel. Seney* v. *Swift & Co.,* 260 U.S. 146, 151, 43 S. Ct. 22, 24, 67 L. Ed. 176, 179 (1922). This standard has long been adhered to by this court:

> As has been many times declared, this [review by way of certiorari] is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U.S. 251, 258, 36 S. Ct. 269, 271, 60 L. Ed. 629, 633 (1916).

These limitations on the availability of review by way of writ of certiorari are embodied within Rule 19 of the Rules of this Court, and are, of course, applicable to petitions seeking review of federal court rulings on habeas corpus petitions. *See e.g. Parker* v. *Ellis,* 362 U.S. 574, 575, 80 S. Ct. 909, 910, 4 L. Ed. 2d 963, 968 (1960).

This Court has, by its exercise of certiorari jurisdiction, and its refusal to exercise same, established certain guide-

lines that aid in the identifying of those cases which satisfy the stringent criteria referred to *supra*. Out of this history of the use of certiorari jurisdiction, certain categories of cases appear wherein this Court has deemed it appropriate to exercise this limited mode of review. Rule 19(b) of the Rules of this Court, while by its own language is not an exhaustive description, sets forth a listing of those characteristics which, if present in a case, might cause this Court to exercise its certiorari jurisdiction. Petitioner seeks to bring himself within a category of case not specifically described in Rule 19(b), that is, those cases wherein one decision of a Court of Appeals is seen to be in conflict with another decision by that same Court of Appeals.

This particular category of cases arguably justifying the exercise of certiorari jurisdiction, if it in fact exists as such, is narrowly proscribed since it has been this Court's view that "it is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 634, 1 L. Ed. 2d 658, 659 (1957) (per curiam decision on a question certified by a United States Court of Appeals).

Petitioner herein alleges that the "decision of the Court of Appeals denying a certificate of probable cause conflicts with its prior position that such certificate should be denied only where a petitioner makes no substantial showing of the denial of a federal constitutional right." (Petition for Writ of Certiorari, p. 4). In fact, it is precisely that standard that was applied by the Court of Appeals, and it is the result of that application with which Petitioner quarrels.

The Court of Appeals explicitly found that Petitioner raised "no substantial constitutional issue" in his petition for habeas corpus, and adopted the reasoning of the District Court in reaching this conclusion (Petition for Writ

of Certiorari, Appendix A at p. 10). Furthermore, in declining to issue a certificate of probable cause, the District Court stated:

> ". . . I do not find that questions of constitutional magnitude are fairly raised, to provide a basis for habeas relief. The Court entertains no doubt as to the correctness of its ruling adverse to petitioner. I conclude, as I must, that the instant appeal is without substantial merit." (Petition for Writ of Certiorari, Appendix B at p. 12.)

The District Court ruling, which was in effect affirmed by the Court of Appeals, evidences the application of the standard utilized within the First Circuit in passing on applications for certificates of probable cause.[1]

Thus, it can be seen that in upholding the District Court's ruling,[2] the Court of Appeals was endorsing the application of precisely the standard alleged to be abandoned by Peti-

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[1] While the two cases cited by Petitioner to establish the past acceptance of this standard by the Court of Appeals are only tangentially concerned with said standard, one is particularly informative. In *Ex Parte Farrell*, 189 F.2d 540 (1st Cir. 1951), *cert. den. Farrell* v. *O'Brien*, 342 U.S. 839, 72 S. Ct. 64, 96 L. Ed. 634 (1951), the Court of Appeals was primarily concerned with the question of timeliness *vis a vis* applications for certificates of probable cause. However, in *Farrell* the Court of Appeals in interpreting 28 U.S.C. §2253, the statute pertinent herein, found that the purpose of that statute was "to eliminate the abuse of the writ of habeas corpus in the federal courts by the undue interference with state processes incident to protracted appellate proceedings in frivolous cases." 189 F.2d at 543. In support of that "important public policy," the Court of Appeals set forth a salutary principle that district judges should not hesitate to deny an application for a certificate of probable cause where it is convinced that an appeal would be futile. 189 F.2d at 543.

[2] It has been held in at least one Circuit that a District Court's denial of an application for a certificate of probable cause is entitled to "weighty consideration" by a Court of Appeals. *United States ex rel. Sullivan* v. *Heinze*, 250 F.2d 427, 428 (9th Cir. 1957), *cert. den.* 356 U.S. 943, 78 S. Ct. 789, 2 L. Ed. 2d 818 (1958).

tioner, and the results of that application. The allegation of Petitioner that the First Circuit is in conflict with its own standard is made, Respondents submit, solely for the purpose of placing his cause within the scope of this Court's certiorari jurisdiction.

B. THE CAUSE SHOULD NOT BE REVIEWED BECAUSE PETITIONER HAS SHOWN NO DEPRIVATION OF A CONSTITUTIONAL RIGHT ARISING OUT OF THE RULINGS OF THE COURTS BELOW.

In support of their contention that Petitioner has in fact made no showing of any deprivation of a constitutional right, respondents refer for this Court's consideration to the ruling of the United States District Court on the Petitioner's application for a writ of habeas corpus (Petition for Writ of Certiorari, Appendix C), and to the ruling of the Rhode Island Supreme Court on Petitioner's appeal from the denial of his motion for a new trial (Petition for Writ of Certiorari, Appendix D.). Respondents submit that these decisions clearly demonstrate that the instant Petition for Writ of Habeas Corpus rests squarely on a finding of fact, rather than a ruling of law, which the Petitioner alleges is erroneous. More particularly, respondents contend that Petitioner disputes the weight given to his alleged newly discovered evidence. In this regard, The United States District Court concurred in the holding by the state trial court, and found no abuse of discretion, and certainly none that could amount to a denial of due process of law. The District Court gave the appropriate deference to the state trial judge insofar as his determination as to a question of fact. 28 U.S.C. §2254(d).

Conclusion

Therefore, Respondents pray that the instant petition for a writ of certiorari be denied.

Respectfully submitted,

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